IBA Anti-Corruption Committee

2nd Submission to United Nations Special Session of the General Assembly against Corruption 2021

International Bar Association

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Introduction

The IBA's Anti-Corruption Committee (ACC) references its prior submission and reiterates the importance of the inclusive nature of the preparatory process, including substantive consultations, for the United Nations Special Session of the General Assembly against Corruption.[1] The ACC welcomes the opportunity to contribute to this process and to continue supporting the global fight against corruption.

This second submission of the ACC focusses on the November 2020 intersessional meeting on asset recovery. State Parties should consider adopting the ACC's proposals outlined below and including them in the General Assembly's political declaration to be issued at the Special Session in June 2021. Alternatively, the State Parties could adopt them in the form of an additional protocol to the United Nations Convention against Corruption (UNCAC). Following introductory remarks below, the ACC turns to the thematic focus of the second intersessional meeting, namely Asset Recovery. Prior to the intersessional meeting scheduled for February 2021, the ACC intends to provide its third submission.

Asset Recovery

a. Obstacles hampering asset recovery

State Parties seek to reduce the incentives for perpetrators to commit profitable crimes such as corruption. This includes stepping up efforts to require the forfeiture of criminally obtained assets, with a view towards repatriating those assets. Notwithstanding significant progress since the entry into force of the UNCAC, there remain serious opportunities for improvement and the elimination of certain obstacles.

Empirical research suggests that criminal proceedings are subject to limits, often preventing them from being effective in relation to asset recovery. For example, a study carried out by the Stolen Asset Recovery Initiative (StAR) found that – in situations in which the defendant deceases, becomes a fugitive or enjoys immunity – criminal prosecution lacks effectiveness.

[1] Details about the role of the International Bar Association and its Anti-Corruption Committee can be found in the first submission to the UNGASS process as well as on the ACC's website.

In practice, a number of factors further impact this situation, enabling criminal structures to keep their ill-gotten gains. These may include the multijurisdictional character of the cases at stake leading to asset recovery. The investigation and tracing of criminally obtained assets often require analysing large portions of complex data (independent of the nature of the data involved), which is resource intensive in many ways. These criminal investigations also often require a dense level of mutual legal assistance in criminal matters. Even if the requesting State successfully files an appropriate request for mutual legal assistance and then receives that assistance, the process of obtaining and validating it often remains time-consuming and without any guarantee of a successful asset recovery.

Furthermore, whereas asset tracing may be complex and resource intensive, so is the process of asset repatriation upon criminal conviction. Recognising the different legal traditions and applicable standards of proof in criminal cases, these high standards are frequently equally applicable to asset forfeiture, which can be exclusively conviction-based in many countries. One also needs to take into account instances in which these steps have been successfully taken, but the asset recovery fails nevertheless.

Once the hurdles mentioned above have been overcome and the criminally obtained assets forfeited with a view towards their repatriation to the country or person of origin, the repatriation process itself may be complex, subject to certain conditions being fulfilled and, once more, time consuming. And even then, it may fail.

The principle of *the equality of arms*, applicable to all parties involved in a criminal case, suffers in many of these cases severely. Especially those who are damaged parties or victims in any other way of these crimes, regularly face difficulties or lack the possibility altogether to obtain standing in the case (see also infra c.).

With a view towards maximising asset repatriation in the sense of article 51, UNCAC asset tracing needs to become significantly more effective. A combination of legislative and practical steps needs to be taken to achieve this goal, including the following:

1. Adapting article 43 UNCAC

States Parties are encouraged to adapt article 43 UNCAC to ensure that State Parties shall cooperate in criminal matters in accordance with articles 44 to 50 of this Convention. Where appropriate and consistent with their domestic legal system, States Parties should assist one another in investigations of and proceedings in civil and administrative matters relating to corruption.

2. Victim's access to the prosecutor's and court's files of a criminal case

Where this is not already the case, and in accordance with their legal principles, State Parties should amend their legislation in order to facilitate victim's access to the prosecutor's and court's files of the criminal case, at least as far as necessary to guarantee their rights.

3. Use of existing instruments

Since the entry into force of UNCAC, additional tools to assist countries in their efforts to trace, locate and repatriate assets have been developed, including the Guidelines for the efficient recovery of stolen assets in the so-called Lausanne Process. Authorities should make effective use of these guidelines when working on asset recovery cases.

b. Insolvency remedies

To close the recovery gap, State Parties should – in line with their respective legal systems – use all available legal remedies. Existing insolvency remedies can provide powerful tools in the fight against corruption. This applies especially to situations in which court judgments have been obtained against companies and natural persons or a debt is admitted. In those circumstances, insolvency practitioners such as liquidators over companies can be appointed. The duty of the insolvency practitioner is to realise that assets of the company are the subject of the insolvency process and then distribute the proceeds fairly to the creditors. Those assets can include legal causes of actions against those responsible for causing the liabilities of companies, including directors and former directors.

Further valuable assets may exist, for instance, if a bank has been involved in a company's laundering of the proceeds of corruption. Often persons of great wealth such as banks and legal and accounting firms facilitate corruption. In such circumstances, their assets can be attacked by insolvency practitioners if shown that they have caused loss. Such loss can take the form of a liability or debt that a company owes (for instance to a State) because it has been complicit in a matter involving corruption. Accordingly, State Parties may consider taking the following steps:

1. Legislative steps

State Parties should legislate to enable a company to be wound up and an insolvency practitioner appointed in circumstances where there is evidence to the civil standard that it has been used for a criminal or illegal purpose, including facilitating corruption. Sometimes this is referred to as winding up a company on just and equitable grounds. The persons who have standing to bring the application should include creditors including contingent creditors. See also submissions on standing as described below in lit. c of this submission.

2. Recognition of overseas measures

State Parties should also ensure that their legislation enables the recognition of overseas insolvency professionals as well as freezing orders, third-party disclosure orders, and search orders to be obtained in appropriate cases to support insolvency professionals, both within and without their jurisdiction. In this way, assets will be preserved, and the insolvency practitioner can gain access to relevant third-party records including banking and accounting material.

3. Use of bankruptcy proceedings

Bankruptcy proceedings provide, mostly in common law jurisdictions, for a rarely used but highly efficient alternative to civil or criminal proceedings to recover assets resulting from corruption. Their very purpose is to seize assets of the debtor and distribute them equitably to creditors and other injured parties. Even though bankruptcy proceedings remain helpful in corruption cases in civil law jurisdictions, they feature a milder competitive advantage towards

criminal proceedings due to the joint criminal and civil proceedings. As a result, in most asset recovery cases involving corruption in civil law jurisdiction, the filing of a criminal complaint will often be the most efficient way forward.

Many corruption schemes involve the creation and use of domestic or overseas companies for the purpose of receiving bribes, transferring bribes or holding embezzled funds. As a result, insolvency proceedings can either target: (i) the entity that was deprived from its assets as a result of corruption from its officials (*i.e.*, the victim); or (ii) the entity that committed or assisted in the corruption.

While bankruptcy proceedings are traditionally commenced in case of illiquidity or based on the balance sheet test (*i.e.*, when liabilities exceed assets), some jurisdictions provide for declarations of bankruptcy on just and equitable grounds, when business has been conducted illegally. This ground for winding up is very useful in cases of corruption or embezzlement, as it allows targeting companies that are used as instruments of corruption or for the laundering of illicit proceeds.

The granting of a moratorium – which has an immediate legal freezing effect on the asset recovery process – is generally a first step in bankruptcy proceedings. It freezes the status quo, thereby preventing debt collection from the insolvent company from the start of the bankruptcy process and blocking any further transfer of assets.

The appointment of an insolvency practitioner then plays a key role in the asset recovery process. Such practitioners generally benefit from broad investigatory powers and powers to claim assets in order to identify and retrieve the proceeds of corruption. In particular, insolvency practitioners may: (i) gain access to all books, transaction records, accounting documentation or other financial information, and conduct a comprehensive audit; (ii) interview directors, managers or other third parties; (iii) take possession of the assets of the bankrupt company and manage them; and (iv) acting on behalf of the bankrupt entity, file claims against directors, managers or third parties for their wrongdoings or for damages. Of particular relevance is the possibility, in certain bankruptcy proceedings and jurisdictions, of accessing probative evidence otherwise covered by legal privilege.

Alternatively, or even additionally, courts may also appoint a receiver who may assist with the recovery of funds. In many common law jurisdictions, a receiver can be appointed by

the court at an early stage to ensure that assets are preserved and available to meet a judgment. Such an appointment often takes place where it can be shown that a company has been involved in fraud and will not obey court orders.

After obtaining relevant evidence to build a case and identify relevant assets, insolvency practitioners have access to a number of different legal actions, including the following:

1. Insolvency practitioners may file proprietary actions to claim assets that belong to a company, including misappropriated assets or subsequent assets into which the original property was converted. In addition, in many common law jurisdictions, the theory of "constructive trust" enables Insolvency Practitioners to assert claims over bribes paid to agents, as they are considered to be the proceeds of the breach of a fiduciary duty. Alternatively, in civil jurisdictions, creditors may use personal claims.

2. Most jurisdictions provide for the ability to void transactions carried out within a suspect period, close to the commencement of bankruptcy proceedings or with affiliated persons, as potentially gratuitous, preferential or outside of the ordinary course of business.

3. Another important tool is the possibility to file civil and criminal liability actions against directors or managers of a bankrupt entity for mismanagement or fraud causing an increase in the bankrupt company's liabilities.

4. Ultimately, where the bankrupt entity is a sham, merely created and used as a façade for fraud and the evasion of liability, courts in certain jurisdictions may pierce the corporate veil and assimilate the entity's liabilities and assets to those of its shareholders or ultimate beneficiaries.

Despite the adoption of regulations such as UNCITRAL Model Law and the EU Regulation on Insolvency Proceedings, effective asset recovery in corruption cases remain

dependant on various factors. These include the ability of jurisdictions to facilitate cross-border coordination of such proceedings and to provide for clear rules on jurisdiction, recognition of foreign judgments, cooperation among courts and choice of law.

c. Legal Standing

i. Victims of (grand-) Corruption Cases

While kleptocracy and being a potentate may not necessarily be criminal in themselves, the consequences often are, whether through the application of domestic, international or even transnational law. Such criminality can take different forms, including corruption, fraud, breach of trust, money laundering and many others. Financial consequences aside, they can affect the enjoyment of human rights, including economic and social rights such as the right to work, the right to education and the principle of non-discrimination, as well as civil and political rights such as the right to a fair trial.[2] On top of negative consequences for the society as a whole, such criminality might also result in direct or indirect violations of human rights of an individual. Drawing a link between corruption (*lato sensu*) and human rights therefore can bring an extra dimension that enables victims of human rights violations to fight corruption.

Generally speaking, the international legal order assigns to victims the fundamental rights to access the courts and to obtain compensation for the harm suffered.[3] However, looking at the UNCAC, as well as most of national laws, legal standing in grand corruption cases is mostly reserved to public authorities such as public prosecutors or public defenders, who act on behalf of a State and in the public interest.

In cases of hybrid regimes or kleptocracy, or in the absence of effective democracy and strong institutional governance, the lack of independence of the public authorities can be an obstacle to recovering the proceeds of corruption, either because the public authorities of the State looted do not want to take any legal action or do not have the practical or judicial means to do so. This highlights the need for an alternative to the exclusivity of public action and the

2 See e.g. the Final Report of Human Rights Council Advisory Committee on the Issue of the Negative Impact of Corruption on the Enjoyment of Human Rights of 5 January 2015, A/HRC/28/73.
3 Principles 4 to 7 and Principles 8 to 11 of the Principles of Justice for Victims.

necessity of allowing certain individuals or entities to initiate and pursue recovery action of proceeds of corruption which, once recovered, could be used collectively in support of projects of public interest. To date, the recognition of the legal standing of victims of grand corruption remains a challenge under domestic laws.

In line with existing UN definitions of the notion of victims[4], State Parties should recognise victims of acts of a potentate as such and grant them the rights deriving from this status, including legal standing in cases of (grand) corruption.

ii. Shareholders

Existing legal tools and remedies may grant shareholders legal standing. Such is the case, for example, of the so-called individual and derivate shareholder claims. If the management of a corporation acts in a way that is contrary to the interest of a corporation, a shareholder can bring a derivate claim before the court, in their own name and/or for the account of a corporation. Based on the shareholder's rights, this shareholder can act on behalf of the corporation. In this context and by way of example, any financial compensation resulting from a successful claim will be attributed to the corporation, as opposed to the private shareholder. In contrast, a shareholder also has the right to bring a claim before the court in their own name and for their own account (*i.e.*, an individual claim). Under this approach, the shareholder will be entitled to any resulting financial compensation.

Based on the above, every citizen, in the capacity as a taxpayer, should have legal standing both on an individual and derivate basis. Indeed, any damage to State finances constitutes indirect damage to beneficiaries of that State's public resources, and each citizen should be considered a victim with legal standing.

4 The Magna Carta for victim rights, consisting of Principle 1, Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power adopted by General Assembly resolution 40/34 of 29 November 1985 (hereinafter the "Principles of Justice for Victims" or the "Principles").
As per Principle 2 of the Basic Principles, "[t]he term "victim" also includes, where appropriate, the immediate family or dependents of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization", Principle 18 of the Principles of Justice for Victims, the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law adopted and proclaimed by General Assembly resolution 60/147 of 16 December 2005.

Along the same lines, the freezing or forfeiture of assets linked to corruption on interstate and political levels does not necessarily respond to all facets of the problem. Indeed, such response is a sort of variable geometry and strips the judicial action of one of its fundamental principles: independence. For all of the reasons above, we are of the opinion that victims of corruption and acts of potentates in general should be able to demand the freezing and forfeiture of assets without compromising collective restitution, though individual restitution should be used whenever possible.

iii. Popular action

For various reasons, state-owned enterprises may not take any action to recover assets. This in combination with situations in which Law Enforcement Authorities fail to pursue asset recovery may necessitate introducing alternative legal tools, such as the so-called *popular action*, allowing for a strong cooperative relation among citizens, private practitioners, civil society and law enforcement. Popular Action represents a legal tool available to citizens, private practitioners and civil society, allowing them to be more than watchdogs and to advance the battle against corruption by having standing to proceed with legal measures to recover assets.

Also, there is a pending bill in Brazil that – in order to provide a positive incentive for citizens to engage in such litigation – proposes granting citizens who file a Popular Action and prevail the equivalent of 10% to 20% of the conviction.

d. The creation of a Specialized International Anti-Corruption and Asset Recovery Mechanism

Citizens, companies, corporations, NGOs and other stakeholders are at times confronted with regimes lacking strong independent law enforcement, independent courts and other institutions necessary to deal properly with the scourge of corruption.

With a view towards ending impunity, especially in cases of grand corruption, State Parties should consider creating a Specialised International Anti-Corruption and Asset Recovery Mechanism. Set up as an independent entity, having its legal basis in a UN Resolution, it would bear a subsidiary responsibility for investigating corruption allegations and enforcing anti-

corruption laws in cases in which domestic structures have collapsed or fail to do so. Sanctions could be criminal and/or civil, including non-conviction-based forfeiture orders that would be internationally enforceable.

Annex I – List of contributors

Name	Position in the Committee	Employment	Experience
Claire Daams	Treasurer		Dr. iur. in Criminal Law and Criminal Procedure. Experience in practising in the area of Anti-Corruption, economic crime and Asset Recovery for over 25 years as former Federal Prosecutor, Academic and private practitioner.
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Pallav Shukla	Member	Trilegal, India	Counsel in Trilegal's white-collar crimes and investigations practice. He regularly advises and represents clients in defending anti-corruption enforcement and debarment actions in India; internal investigations; and designing and implementing whistle-blower programs. He also advises clients on navigating anti-corruption and money laundering compliance, including contract management and continuous risk assessment. Pallav contributes as an author to the 'Practical Guidance tool of Lexis Nexis' and 'Getting The Deal Through' (GTDT). He is an alumnus of Harvard Law School (LL.M. '15) and ILS Law College, University of Pune. Pallav clerked for Hon'ble Mr. Justice S. H. Kapadia - Chief Justice of India's Supreme Court.
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Name	Position in the Committee	Employment	Experience
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Rodrigo Kaysserlian	Member	Krikor Kaysserlian Advogados Associados, Brazil	Master's degree in anti-corruption studies before the International Anti-corruption Academy (IACA), Viena, Áustria. President Director of the Brazilian National Institute of Asset Recovery (ibra). Partner at the law firm Krikor Kaysserlian Advogados Associados. Large experience in litigation before the highest courts in Brazil, and, in the last 12 years assisting victims of fraud and corruption in transnational cases originated in Brazil.
Sandrine Giroud	Member	LALIVE, Switzerland	Partner, Officer of the IBA Litigation Committee, former Legal advisor at the Swiss Federal Office of Justice. Specialised in domestic and international litigation, with a focus on commercial disputes, fraud, asset recovery, private client disputes and human rights. Co-editor and co-author of the reference book "Droit Suisse des sanctions et de la confiscation internationales" ("Swiss law on international sanctions and confiscation").
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Name	Position in the Committee	Employment	Experience
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Tomislav Šunjka	Member and Senior Vice Chair of asset recovery Subcommittee	Principal and Founder of ŠunjkaLaw, Serbia	Former IBA ACC representative for Europe, auditor for ISO 37001, 23 years of private practice in white color crime, bribery, corruption, sanctions, money laundering, internal investigations, fraud, complex litigations, asset tracing and recovery.